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THE TRIALS BEFORE THE LEIPSIC SUPREME COURT OF GERMANS ACCUSED OF WAR CRIMES.

THE whole world has watched, with keen interest, the proceedings before the Leipsic Supreme Court, in which German citizens accused of having committed acts in violation of the rules and customs of law have been brought to trial. In addition to this general interest, lawyers in every country have eagerly followed these trials in order to note the methods and procedure adopted, the rules of law declared and the results of these most important proceedings. So far as I have been able to ascertain, no official reports have as yet been forwarded to our law libraries. A pamphlet is on file in the archives of the State Department, entitled, "German War Trials, Report of Proceedings before the Supreme Court in Leipsic, London, 1921, Printed by His Majesty's Stationer". This pamphlet is not to be found, however, anywhere else in the country, as I am informed. It has seemed to me, therefore, that it would be timely and interesting to state briefly, and in a very popular and informal manner, the genesis of this Court, the work accomplished by it and, particularly, the rule of law laid down by the Court that a subordinate military or naval officer must be acquitted of any charge of war crime, if it can be shown that he was acting under the order of his official superior, and that he did not transcend the limits of his instructions.

During the War the Allied and Associated Powers frequently proclaimed their stern determination to bring to justice the German criminals who had committed so many war crimes on the

land, on the sea and in the air. After the Armistice the Allied Nations, and especially Great Britain and France, declared that these culprits, both of high and of low degree, from the Kaiser to the private, must be tried not before a tribunal of their own, but before the courts appointed by the Allied Governments. This question was hotly debated at the Peace Conference in Paris. No demand made at that conference was more bitterly opposed by Germany. Nevertheless, the Allies insisted, and Germany finally yielded. Among the provisions of the Treaty of Versailles are the following:

PART VII.

PENALTIES.

"Article 227.

"The Allied and Associated Powers publicly arraign William II of Hohenzollern, former German Emperor, for a supreme offense against international morality and the sanctity of treaties.

"A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers, namely, The United States of America, Great Britain, France, Italy and Japan.

"In its decision the tribunal will be guided by the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

"The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

"Article 228.

"The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision applies notwithstanding any proceedings or pros-

ecution before a tribunal in Germany or in the territory of her Allies.

"The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

"Article 229.

"Persons guilty of criminal acts against the national laws of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

"Persons guilty of criminal acts against the national laws of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

"In every case the accused will be entitled to name his own counsel.

"Article 230.

"The German Government undertakes to furnish the documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility."

It was the case, however, as to many of the provisions of this treaty, the German Government immediately gave evidence of the fact that it did not intend to abide by its solemn bargain. On the contrary, violent agitation against the execution of these penalty provisions arose throughout Germany. It was soon recognized that the best method to forestall the carrying out of these treaty provisions would be to set up a tribunal in Germany for the purpose of trying those who were accused of war crimes. Matthias Erzberger (recently murdered, as seems certain, by reactionary junkers), one of the most resourceful and daring statesmen of his time, at once saw this point, and, as early as July, 1919, stated to the Constituent Assembly that it was necessary to establish a German State Tribunal for this purpose. Accordingly, and by motion of the Socialist Party, a tribunal was established by the Constituent Assembly to investigate and determine the general subject of war guilt. This was intended

to pass upon national rather than individual responsibility. Hearings were held in Berlin during the fall of 1919. Bethman Hollweg and Vansdorf and other German notables of that time testified fully. Hindenberg and Ludendorf reluctantly submitted to a very limited examination. The conduct of the entire proceeding was in evident bad faith. No definite result was reached, and it gradually came to an inconclusive and inglorious end.

In January, 1920, the Supreme Council of the Peace Conference made an official demand upon Holland for the surrender of the Kaiser Wilhelm II. To this demand the Government of Holland made a flat refusal, stating, however, that precautions would be taken to guard their unwelcome guest. In March, 1920, this attitude of Holland was accepted by the Allies, and no further efforts were made to extradite the former Emperor. In the meantime, however, vigorous preparations were made for the trial of the other war criminals of Germany. Lists were prepared by England, by France and by Belgium, of those whose surrender for trial must be demanded of Germany. These lists included Hindenberg, Ludendorf, the former Crown Prince of Germany, former Crown Prince Rupprecht of Bavaria and many other great war chiefs. The former Crown Prince of Germany cabled to President Wilson an offer, characteristically theatrical and flamboyant, to stand trial in place of all those who were demanded. To this absurd proposition the President very properly made no reply.

In January, 1920, Erzberger suggested that the Germans accused of war crimes be tried before the Supreme Court in Leipsic. After bitter debate this was agreed to by the German National Assembly. A court consisting of seven judges was set up to take charge of these trials. These measures were violently opposed by the Prussian junkers, but were approved by the German people. As an evidence it may be noted that a manifesto was issued, signed by a great number of prominent German generals and admirals accepting and approving the proposition that these cases be tried before the Leipsic Court.

In the meantime, in January, 1920, the German Government had sent a note to the Allies asking that the provisions of the

Treaty calling for the surrender of those accused persons be not executed, and proposing that they be tried in German courts. This request was at first denied, and the Council of Allied Ambassadors presented to the German Government a list of all criminals, with demand for their surrender. The first list demanding the extradition of 890 war criminals, with an enumeration of the crimes charged against them, was delivered to Baron Kurt von Lersner, the head of the German Peace Delegation, in Paris, on February 3, 1920. von Lersner refused to forward the list, and sent in his resignation to the German Government which was accepted. This list was then, on February 5th, sent by the Council of Ambassadors of the Allied Powers to Berlin by courier, with an appropriate note. It was received by Chancellor Bauer, the German Premier, who expressed the German Government's official disapproval of von Lersner's action. Chancellor Bauer then sent a Commissioner to Paris with a suggestion that trial before the Leipsic Court be substituted for extradition. Finally, the Allies replied, in February, that they accepted the proposal that these culprits be tried before the Leipsic Supreme Court, reserving however, the right to pass upon the decision of that Court and the right to withdraw their approval, if not satisfied with the action of the Court.

Having thus agreed to submit the matter, at least tentatively, to the Leipsic Court, the Allies designated, in the latter part of February, 1920, a list of forty-six men for trial, and in the following April the Court was organized for business. The preliminary proceedings, however, dragged their slow length along, and for months no prisoner was brought to trial. In August, 1920, Federal Minister of Justice, Dr. Rudolph Heinze, made the following statement to the New York *Times*:

> "The first list of alleged war criminals submitted by the Entente in February last contained some nine names, but there was absolutely no evidence upon which to proceed legally, which fact even the Entente could not ignore. The Entente then selected from this list forty-five men who, though not particularly distinguished by rank or notoriety, seemed guilty, and as the Entente thought, might easily be convicted. The Federal Prosecutor immediately investigated these cases, and thirty-three of the accused were success-

> fully arrested and examined. Some had to be set free again, in accordance with German law, as there was no danger of their becoming fugitives, others furnished bail, and some still are imprisoned. The result of the investigation, as shown by stenographic reports of the examination of the accused, has been sent to Paris, London and Rome to aid the Entente authorities in furnishing evidence and witnesses. We have not yet had any communication from them, and, of course, cannot proceed until that arrives. It is only natural that the accused should not admit the crimes charged against them. Most of them have given us the names of French and German witnesses who will be called in their behalf. As matters stand, it will probably be winter before the first cases are tried before the Federal Court at Leipsic."

Dr. Heinze's prophecy came true. In April, 1921, no trials had begun at Leipsic. On April 23rd the German Government addressed a note to the Council of Ambassadors, explaining that a number of technicalities (such as the non-arrival of evidence from Italy and other countries) were responsible for the delay in the trial of those accused of war crimes.

In February, 1921, announcement had been made that four out of the eleven cases on the Entente's list of war criminals had been set down for prosecution before the Leipsic Court. On March 23, 1921, further announcement was made that the trial of war criminals before the Supreme Court at Leipsic was expected to commence at the beginning of May. It was said that the cases brought by the British Government would be taken up first, witnesses coming to Germany from England to testify. According to this announcement, the first case would be against a non-commissioned landstrom officer named Heyner for illtreating prisoners in the Ruhr region, where British and French troops were imprisoned; and that the second case would be against Lieutenant Karl Neumann for sinking the hospital ship *Dover Castle;* while the third case would be against Lieutenant Werner, charged with sinking another hospital ship; and the fourth charge would be against Captain Mueller for criminal negligence in prison camps. The testimony against these four officers was taken in April, in the Bowstreet Police Court, in London, for use in the coming trial at Leipsic. While this tes-

timony was being taken and preparations were being made, the Reichstag, on May 4th, adopted a bill providing for the trial of the war criminals named in the list of the Entente, even where evidence had been insufficient to justify prosecution, or where the innocence of the accused had been established, the object of this bill being to place the vindication of the accused on the public records. On May 20th, Sir Ernest Pollock, Solicitor General of England, together with Sir Ellis H. Williams, K. C., went to Leipsic to watch, on behalf of the British Government the trial of these cases. The Solicitor General took with him a number of witnesses to give evidence in addition to that which had been taken in the Bowstreet depositions.

Finally, the first case was brought to trial on May 23, 1921, in the Supreme Court of Justice of Leipsic, in a room of paneled oak, with adornments of dull gold and with windows in which were set the armorial bearings of the various German states. At the Judge's table, covered with green baize, sat the seven Judges in robes of magenta color, with velvet caps. On the right was the accused, with counsel for the defense, and at a table in the center sat the British representatives, Sir Ernest Pollock, Solicitor General, as well as Sir Ellis Hume Williams, K. C., and Mr. Gattie, of the English Bar. The first prisoner brought to trial was Corporal Heyner, to whom the President of the Court read an indictment charging him with kicking and beating and otherwise maltreating British prisoners at Hearn Camp, Westphalia.

The President, or Chief Justice of the Court, Dr. Schmidt, then made a short address, stating that the only duty of the Court was to arrive at a decision as to the guilt or innocence of the accused, uninfluenced by political considerations or national feelings. This same warning was addressed to each witness as he was sworn. The evidence disclosed the fact that at this camp prisoners had refused to work in coal mines, claiming it was contrary to international usage for war captives to be compelled to do work of assistance, direct or indirect, towards the carrying on of war against their own country. On account of this refusal the Corporal had committed the acts with which he was charged. The accused corporal denied that he had struck any

of the prisoners, although he said: "I was told to make these men work. I had to do so, because the Prussian soldiers' duty is to obey orders, even though he perish." It was charged that he had struck with his rifle butt one of the prisoners while the latter was walking down a stairway, and that by reason of the blow the prisoner had fallen unconscious. He denied that he had struck the man intentionally, claiming that as he was walking down the stairway he had struck accidentally, with his rifle butt, the prisoner, who was walking down the same stairway below him. The Corporal said that if he had struck the man with the butt end of the rifle, he would not have got up again, and also said: "As a Prussian soldier, I was brought up to believe you have to be severe sometimes in order to show orders are intended seriously." It is remarkable that the first witness called against Corporal Heyner, an English soldier, said with extraordinary frankness: "Personally, I cannot say anything against the accused." He did, however, state that the Corporal had struck the prisoner while the latter was on the stairs with such force that he had fallen unconscious. Sixteen other soldiers gave evidence against the Corporal charging him with various atrocities. Among these may be mentioned his action in compelling a British soldier by the name of Cross to stand under a douche for an hour, turning on alternately hot and cold water taps, with the result that the prisoner's mind was affected, and with the belief that he had since died. On the following day, May 26th, the evidence was completed. The Prosecuting Attorney and counsel for the defense summed up. The defendant himself made an address to the Court. The Court found him guilty and sentenced him to ten months' imprisonment.

The next officer to be tried was Captain Mueller, who was charged with cruelties to prisoners in the Flavy-le-Martel prison Camp in the Department of the Aisne, France. The proof showed that he had struck and kicked prisoners, had bound them to a stake and had compelled sick prisoners to work. It may be noted that Captain Mueller was a man of intelligence and education, practicing as a barrister at the time of the trial, and appearing in German courts. On May 30th the Court found that he was not responsible for the bad state of the camp, but

pronounced him guilty of several acts of inhumanity, of which the President described the compelling of sick men to work as the worst. A sentence of six months imprisonment was imposed.

Solicitor General, Sir Ernest Pollock, returned to England after the opening trials, and publicly stated that he was impressed with the authority of the Court at Leipsic, declaring that the President was a man of strict character and impartiality. Sir Ernest Pollock also stated that the British witnesses were examined with complete fairness and that their testimony was accurately interpreted. He said that he was satisfied that the Court might be regarded with the fullest confidence. It may be noted that a British Police Inspector who attended the trial of Corporal Heyner said that he thought his sentence of ten months was fair, in view of the fact that some of the charges were not true and that in certain cases he had a just provocation.

Then came the trial of Robert Neumann, apparently a private charged with cruelty to British prisoners at Pomofesdorf Camp. It appears that Neumann who was an unskilled laborer, and a man of insignificance, was indicted jointly with a Sergeant Trinke, who had fled the country. It was shown that this prisoner, Robert Neumann, had knocked down one or more prisoners with a rifle butt and struck them while lying on the ground. At the close of his trial he collapsed, sobbing and weeping bitterly. This outbreak occurred in the course of the speech of General von Fransecky, of the War Ministry, who was called as an expert on military laws covering prison camps:

> "To the military eye," said this German General, "a sad picture is presented by this case, a tragic one. On the one hand, the prisoners either openly or covertly disobeyed orders to work, drank and attacked sentries. On the other hand, Germany was exhausted, putting out the last ounce of her strength, having to employ as sentries partly old and broken men, partly untrained soldiers, unsuitable for the difficult task.
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> "In my opinion the only ray of light in this picture is the conduct of this old soldier, painfully striving, in accordance with his military training, to fulfil his duty. He himself was obeying the orders of his superiors, and in his own turn expected those subordinate to him to do their duty.

> This man who tried to do his duty, and who bore the highest character as a soldier, now finds himself in the bitterest position possible for an old soldier, that of a so-called war criminal."

The General submitted that the prisoners had to be made to work, and the instructions provided that, if necessary under such circumstances use could be made of the rifle butt. He admitted that in a few cases Neumann went a little too far, instancing especially the hitting of a prisoner lying on the ground. Even these instances, however, were comprehensible and, to a certain extent, excusable, he maintained. In concluding the General again held up Neumann as an exemplary soldier, faithful to his duty. Notwithstanding the touching appeal of the General, Robert Neumann was convicted and received a sentence of six months imprisonment.

Next came, on June 4, 1921, on the docket of the Court the last of the four cases in which the English Government was particularly concerned. This was by far the most important. The defendant was a Lieutenant, Karl Neumann, the commander of a German submarine, who admitted that he had torpedoed and sunk the British hospital ship *Dover Castle.* It appears that there had been a preliminary examination of the case of Lieutenant Karl Neumann which resulted in the establishment of his complete innocence, according to the German authorities. Nevertheless, under the statute passed by the Reichstag, to which I have referred, his case was brought up for trial before the Leipsic Court to the end that there might be a public record of his vindication. When his case was called the Public Prosecutor demanded his acquittal upon the ground that he was acting under orders of his superiors. Lieutenant Neumann, in his evidence, admitted sinking the *Dover Castle,* in clear weather, but said that he was acting under instructions from the German Government, as the vessel was not keeping the special channel designated by Germany. The prisoner also stated his conviction that the hospital ship was carrying munitions, but he could not adduce evidence to justify this statement, and the Court refused to admit the allegations as evidence. The prosecutor said that, according to his personal view, hospital ships were employed for

purposes contrary to the Hague Agreement, if they were used for the transportation of soldiers wounded in the course of land warfare, as they could only be used, as he believed, in connection with naval operations. The Chief Justice of the Court declared that Neumann was acquitted, with costs against the German Government, on the ground that he had to obey the orders of his superiors. The President further stated that all civilized nations recognized the principle that a subordinate is covered by the orders of his officials. He said that the accused had carried out these orders without in any way exceeding them, and that there was nothing to prove that he had been guilty of any particular cruelty. He acted as he had to act, the judge said, and in the opinion of the Court there was not the slightest doubt that his orders were justified. At the end of this trial, as the Court arose, the British Commission bade farewell to the presiding officer of the court, who thanked them for their attitude during the trials. This ended the trials of the four prisoners in which the British Government was particularly interested.

The Court next took up the case of Max Randohr, a German soldier, who was charged with having illtreated and imprisoned Belgian children, at Grammock, in 1917. These charges were brought by the Belgian Government. The defendant was acquitted, with costs against the German Government. Against this result the Belgian Minister of Justice protested, and the Belgian Minister of Foreign Affairs instructed the Belgian Minister at Berlin to convey this protest, and to inform the German Government that Belgium intended to insist upon its right to try accused persons under the terms of the Versailles Treaty. The President of the Belgian Chamber of Deputies stated that the Belgian Chamber was unanimous in considering the acquittal of Randohr a parody on justice.

Apparently, Belgium decided to proceed with no more cases before the Leipsic Court, because the next case was that of General Stenger, former commander of the 53rd German Infantry Brigade and Major Benni Crusius charged by the French Government with the murder of prisoners of war. It is stated that General Stenger, in August, 1914, at Saarburg, issued an order not to take French prisoners. He was a distinguished German

officer, and lost a leg during the war. In preferring these charges, the French Government pointed out the German law which does not exonerate from blame any criminal act on the ground of obeying superior officers, if the accused knows that the carrying out of such orders involves the commission of a crime. These charges purported to give the very language of the orders of General Stenger. On June 29th the trial of General Stenger began. He came into the court room on crutches in the field gray uniform of a Prussian general, with the highest war decoration, the blue Maltese Cross of the order *Pour le Merite* pinned upon his coat. The President, or Chief Justice, began the trial with the admonition to all persons, to the accused, the witnesses and the experts, to disregard all national feeling and all political hatred. He announced that the preliminary inquiry had not afforded sufficient evidence against General Stenger, but that under the German law already mentioned, he must be tried. General Stenger denied that he had ever given orders that defenseless prisoners should be shot. He admitted that he had ordered that the French soldiers who had pretended to be dead and afterwards fired upon the German armies from the rear should be shot.

A dramatic feature of the case was the testimony of Major Crusius against General Stenger. The Major testified that General Stenger had given to him an order to shoot prisoners on the battlefield, and that the Major had passed it on to his brother officers. Major Crusius testified that a German officer, Major Muller, under orders given to him at the instance of General Stenger, had shot and wounded a French prisoner who was in the act of drinking coffee, and he had fallen on his knees and implored Crusius to spare his life, but that Major Crusius directed Major Muller to carry out the orders, and the Frenchman was shot. The Chief Justice asked Crusius how he came to permit such a thing, saying: "How did you come to permit that man to fall on his knees and beg for life, to be shot? You were not serving military orders. I have respect for German military discipline, but nothing like that was ever demanded". Major Crusius said in reply: "General Stenger gave the fatal order which I immediately passed on to my men. Another time

General Stenger said: 'No prisoners; no pardon will be asked, none will be given.'"

A distinguished alienist and member of the Privy Council, Dr. Bumke, testified that Major Crusius was not drunk or mentally irresponsible when he executed these orders to kill prisoners. Another alienist, Dr. Sernow, testified that Major Crusius had been sent to him from the front a nervous wreck, and had told him that: "his whole collapse was chiefly due to the ghastly scenes witnessed on the battlefield incident to General Stenger's order to shoot wounded men and prisoners".

A Silesian Major, Eugene Oberdorfer, who wore the decoration of the Iron Cross, testified as to the murder of three French prisoners. He said: "They were on their knees crying for mercy. One of them said he was married. The Sergeant did not want to shoot them, but he had to. He had direct orders from Stenger who was standing by." Here happened a curious and characteristically Prussian incident. General Newbauer, who was in August, 1914, a battalion commander under General Stenger, took the stand and said under oath that his respect for his old commander was such that it was quite possible that he would not be able to tell the truth. Dr. Winger testified that on August 26th, 1914, two wounded Frenchmen were found by a German Ambulance Corps and shot by order of Major Crusius. Dr. Winger testified that he remonstrated with Major Crusius, who replied that he could not do otherwise, adding that a non-commissioned officer had declared that the execution was carried out in accordance with an order that no prisoners should be taken. Notwithstanding this apparently convincing evidence, General Stenger was, on July 6th, acquitted, while Major Crusius was convicted, was sentenced to two years in prison and was forbidden to wear the German uniform.

The President of the Court, Dr. Schmidt, in announcing the decision of acquittal said that an experienced officer like Major Crusius should have known that General Stenger was incapable of giving such orders. The outcome of this trial naturally excited great indignation in France and the other Allied nations. Even if we make full and generous allowance for the difficulties under which the German Court labored, it is impossible not to

conclude that the acquittal of General Stenger was a miscarriage of justice of such a character as to deprive the Court of all claim to the real confidence or respect which it enjoyed. It is inconceivable that Major Crusius should have carried out these orders to shoot prisoners unless he was under the protection of orders from a superior. The testimony of the witnesses was clear and convincing. There appears to have been little, if any, evidence in defense except General Stenger's uncorroborated statement. Even if we are charitable enough to assume that members of the Court were acting in good faith, we are bound to conclude that their German mind and temperament made them unable to find against the testimony of a Prussian Major-General. The Court was apparently able to convict a sergeant and even lieutenants, although the sentences imposed seem to me shamefully inadequate. But when it came to the conviction of a general, the Prussian under the Judge's robe succumbed to his national temperament and his inherited traditions, and miserably failed in his duty to execute justice.

It must be admitted that in English cases the guilt of the offenders while clear, was not strikingly flagrant. Inevitably, jailers will sometimes be cruel to prisoners. This has always been the case, and notably in military prisons. While this fact is no defense, nevertheless, it is some extenuation. And it is somewhat surprising that the English Government was unable to select three stronger cases than those of the three Germans who were first tried before this Court. The reports of the trial of Randohr are too meager for us to render any judgment as to the justice of the decision of the court, but in the case of General Stenger, his crime was ghastly and abhorrent, and it was abundantly proved. His acquittal in my judgment conclusively established the inadequacy of the court.

Both the Frenh and Belgian Governments declined to proceed with any other cases before the Leipsic Court after the result of the Randohr and Stenger cases.

This decision was finally reached while the next case was in progress. In this case two German generals, von Schack and von Krushe, were charged with having intentionally or negligently caused or permitted an epidemic of typhoid fever among

the prisoners in the camp at Miederawehrer, of which disease three thousand French prisoners died. In the course of this trial the French Commission and representatives withdrew from the Court before the verdict was rendered. The two generals were acquitted by the Court. The Court next took up another English case. The defendants were lieutenants Ludwig Dithmar and Johann Boldt who had been serving as officers on the German submarine U-86 under Captain Helmuth Patzig on the night of June 27, 1918. On that night Captain Patzig, with Lieutenants Dothmar and Boldt, torpedoed the British hospital ship *Llandovery Castle* and then fired upon the lifeboats containing members of the crew of the hospital ship who were attempting to escape after the *Llandovery Castle* had been sunk. Captain Patzig could not be brought to trial because he had taken refuge in the State of Danzig, which is now in a free state, and from which the German Government announced it was unable to extradite him. It was proved that the lieutenants on trial had participated in the torpedoing of the hospital ship under the orders of Captain Patzig. The three officers, however, consulted together after the *Llandovery Castle* had been sunk and agreed that they would destroy all the witnesses to their act by sinking the lifeboats containing the survivors. The Court held that the defendants were not guilty of the torpedoing, although it was a violation of international law, because they were acting under the orders of their superior. The Court, however, did find them, on July 16, 1921, guilty of the crime of aiding and abetting manslaughter in firing on the lifeboats. Although it was admitted by the Court that this was done for the deliberate purpose of doing away with witnesses, still the Court held that the defendants were acting under excitement and on impulse driven by a desire to conceal their crime, and, therefore, they were convicted not of murder in the first degree, but of manslaughter, its verdict also being influenced by the difficulties of their situation in that they were acting with a rank officer. The President, however, did say that their act had cast a shadow on the German Navy, and especially upon the conduct of the U-boat warfare.

This case was also, in my opinion, a miscarriage of justice. If the defendants were guilty, they were clearly guilty of mur-

der in the first degree. The firing upon the life boats continued for some time. It was done for a wicked purpose. Under our law it would have been an act of premeditation and with malice aforethought.

I have been unable to find records of any trial after that of Lieutenants Dithmar and Boldt. The result of the Dithmar and Boldt cases was most unsatisfactory to the English Government and, indeed, to all impartial observers. It tended to convince the world that this German Court was not administering full and exact justice.

Nevertheless, it is perhaps better that these criminals should go unwhipped of justice than that they should be brought to trial before a French, English or Belgian military court. There they would receive their deserts and perhaps something more. But the German people would for all time feel that these trials were processes of vengeance rather than of justice. The convicts would be martyrs. And the result would be to prolong the bitterness and hatred which unfortunately exists already and will exist long between Germany and her late enemies. It is believed, I think, by a great majority of the Allied Nations that it was better that the terms of the Versailles Treaty in regard to the trial of the Kaiser were not carried out. His trial would have been either a monumental futility, or else it must have been followed by a sentence of death upon the Kaiser. In either event he would have been for all ages a national hero in the minds and hearts of the German people. His conviction would have kept alive for all time a flame of hatred in the hearts of all the German people. The justifiable execution of Charles I, nevertheless, shocked the conscience of the world, did much to destroy the good work of the Puritans and rendered possible the shame and degradation of England after the Restoration. The death of Louis XVI. by order of the Revolutionary Tribunal of France alarmed the liberals of the world who had up to that time viewed the progress of the Revolution with satisfaction and triumph. Such men as Burke and the Pitts and Fox lost confidence in the cause of the Revolution from that day. The vast body of the French people themselves were startled and terrified. His execution made possible the tyranny of Napoleon

and the gigantic misfortunes of the Napoleonic War. Probably no great war in history was marked by such magnanimity and by so little manifestation of vengeance as was our war between the states. Nevertheless, the imprisonment of President Davis embittered the men of the Southern States far more than the events at Gettysburg and Appomattox. Perhaps the greatest service ever rendered to his country by General Grant was his veto upon the prosecution of General Lee and the other southern generals contemplated by some of the fanatics then in power in our Government.

While, therefore, it shocks our sense of justice that the monstrous war crimes of Germany should go unpunished, it is perhaps best, in view of the interest of all the world and the future generations that this should be so rather than that further seeds of hatred between the nations should be sown. There is, so far as I know, no limitations upon the divine message that there shall be peace on earth and good will to men. Those tidings are intended to include and embrace all the nations of the world. "Vengeance is mine, I will repay saith the Lord."

From a legal standpoint by far the most interesting trial is that of Lieutenant Karl Neumann, for the reason that it involves the application of the rule that a military subordinate is protected by his superior's orders, provided he does not exceed these orders. The acquittal of Lieutenant Neumann on this ground caused great indignation in all the Allied and Associated countries. And this was natural, because the offense was rank and smelt to heaven. It is impossible to conceive a more atrocious crime than to torpedo in cold blood a defenseless hospital ship. Nevertheless, as a legal question, there is much to be said to support the decision of the Court. The British Manual of Military Law in force during the Great War provides in Article 443: "Members of armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government or their commander are not war criminals, and cannot, therefore, be punished by the enemy. He may punish the officials or commanders responsible for such order if they fall into his hands; but otherwise he may only resort to the other means of obtaining redress."

Articles 366 of the Rules of Land Warfare approved by the General Staff of the United States Army, and published on April 25, 1914, for the information and government of the armed land forces of the United States, provides as follows: "Individuals of the armed forces will not be punished for these offenses in case they are committed under order or sanction of their Government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerents into whose hands they may fall."

Commander Sir Graham Bower, K. C. M. G., of the Royal British Navy, said in a paper read before the Grotius Society, on May 27, 1915, when the war bitterness was at its height:

> "The sinking of merchant ships under the conditions stated is certainly reprehensible, but Germany has accepted responsibility, and the German officers and men have not shown any intention to reject the authority of their Government. Therefore, they are not pirates. If they committed, as they have been alleged to commit, acts contrary to the laws of war and humanity—acts which are more reprehensible inasmuch as they have no military value—the question in no way influences the ultimate decision. The blame does not rest with them, but with their superiors."

When the *Lusitania* was sunk, Mr. Asquith, then Prime Minister of Great Britain, made a declaration that those who were responsible for the illegitimate acts of warfare would, if and when the Allies proved successful, be held to strict accountability; but in the same declaration he expresses the view that the perpetrators of such illegal acts, if acting under the orders of their superior military officer or of their Government, cannot be held personally responsible and tried as war criminals by courts-martial.

Dr. Hugh A. L. Bellot, D. C. L. (Oxon) in a most interesting paper, entitled "War Crimes, Their Prevention and Punishment", read before the Grotius Society, Vol. 2, page 30, protests most vehemently against the declaration of Article 443 of the British Manual of Military Law. He says that the proviso in Article 443 makes waste paper of the whole chapter. He states further:

"It must be noted that this article enjoys no statutory force or official authority, but is declared to be only intended for the guidance of officers in the execution of their duty. If this is a correct statement of the law, it is obviously useless as a means of redress or of prevention. The average offender can plead as an excuse the order of his immediate superior officer. We arrive at last at the German Government or the Kaiser. To indict a Government is as futile as to indict a nation, and even a Hague Tribunal would hesitate to create another St. Charles the Martyr, in the person of William II."

Dr. Bellot states that this article was prepared by Col. T. E. Edmonds, C. B. and Professor Oppenheim. He says that he can find no authority for the doctrine other than this Article, and Dr. Oppenheim's book on International Law. The latter said in § 253 of his book:

"Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent government concerned. If members of the armed forces commit violations *by order* of their government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals. In case members of the forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible and the latter may, therefore, be punished as war criminals on their capture by the enemy."

Mr. Coleman Phillipson, in his book on "International Law and the Great War", page 260, takes a directly opposite view. He says:

"It has been contended in some quarters that a combatant's acts, no matter how heinous, outrageous and abominable, do not possess a criminal character if they are committed under orders from a superior officer. But this argument carried to its logical conclusion would lead to ineptitude and absurdity; the successive shifting of responsibilty would exculpate every one until we reached the ultimate cause—in the case of Germany let us say, for example, the Kaiser. Can it, then, be seriously held that several millions of men may act contrary to law established, and perpetrate horrors and atrocities, and that they should be considered entirely guiltless on the ground that they carried out the

> admittedly illegitimate commands of their supreme authority? The safety and stability of a nation or of a family of nations are incompatible with such an exaggerated and preposterous notion of vicarious responsibility."

The same rule is laid down in Mr. Hall's work on International Law, 6th edition, page 410, by Professor Holland in his *Laws of War and Land* article, 117 and 118 (see Dr. Bellot's paper, *supra,* page 46).

The decisions in English courts bearing upon the responsibility of subordinates in regard to acts committed pursuant to an illegal superior order, are somewhat conflicting. In Sir James Fitzjames Stephens great work, "The History of the Criminal Law of England", he lays down the rule as follows:

> "The doctrine that a soldier is bound under all circumstances to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not likely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army."

It will be observed that this exposition of the law relates chiefly to the duty of the subordinate in time of peace. So, in the case of Warden *v.* Bailey, 4 Taunt 67, a soldier disobeying, in time of peace a command which an officer had no right to give, obtained damages for unlawful arrest.

And in Rex *v.* Thomas, 4 M. & S. 442 (815) a sentinel on board a man of war, in time of peace, who, acting upon the orders of his superior officer, fired at and killed a British subject, was found guilty of murder.

But, on the contrary, in time of war there is high authority supporting the ruling of the Leipsic Court. In Sutton *v.* Johnstone, 1 East. 548; also 1 Tr. 493, an order was issued in time of war which was disobeyed by the subordinate officer, for which disobedience the latter was brought before a court-martial and was acquitted. Thereupon he sued his superior officer who had had him arrested and put on trial for damages for false arrest and malicious prosecution. The court decided that no action lay, and held, without scrutinizing the order, that the mere fact that an order, however impossible of compliance, was given at all, and that it was disobeyed, constituted a probable cause for bringing the plaintiff to trial. Lord Mansfield said in this case:

> "A subordinate officer must not, even to save the lives of others or his own life, judge of the dangers, propriety, expediency or consequences of the orders he receives. * * * Nothing but a physical impossibility can excuse him. * * * The first, second and third part of a soldier is obedience."

The rule laid down by Lord Mansfield in Sutton *v.* Johnstone was not followed in a recent case arising out of the Boer War. In that case a soldier, acting under the orders of his superior, shot a servant for delay in producing a bridle that had been requisitioned at a place in which martial law had been proclaimed during the South African War. He was tried for murder by a special court under a special act—a civil court empowered to try offenses during the period of the war, whether committed by soldiers or civilians. The court would accept neither of the extreme propositions put forward by the prosecution and the defense respectively (The Queen *v.* Smith, 17 Cape Reports, 1900, 561). The decision of the Court is reported as follows:

> "It refused to hold that a soldier was bound to obey and was therefore protected in obeying, every order, however unlawful; it equally declined to accept the proposition that a soldier was responsible at common law whenever he obeyed a command that was unlawful. It assumed the order was unlawful, but acquitted the soldier on the ground that a soldier is only bound to obey lawful orders, and is responsible if he obeys an order not strictly legal, is an extreme proposition which the Court cannot accept for its guidance. * * * The order is not so *plainly illegal* that Smith

> would have been justified under the circumstances in refusing to obey it. Although he is only bound to obey lawful orders, he is protected in obeying some orders not strictly legal. If in any doubtful case a soldier was entitled to judge for himself, to consider for himself, to consider the circumstances of the case, and to hesitate in obeying the orders given him, that would be subversive of all military discipline. One must remember that *especially in time of war* immediate obedience to orders is required for a private soldier, and therefore it is not desirable that a soldier should be encouraged to question the orders given to him by his superiors in cases where there is some doubt whether the order is lawful or not."

In our own courts the decisions are not less conflicting. In the case of Little *v.* Barreme, 6 U. S., 2 Cranch 170, the commander of a ship of war of the United States, in obeying his instructions from the President of the United States, seized the Danish brigantine *Flying Fish,* which was sailing from a French port. The Act of Congress under which the President made this order only authorized the seizure of vessels sailing *to* a French port. The Court held that the seizure was illegal, and that Captain Little, of the United States frigate, was responsible in damages. Chief Justice Marshall, as is well known, had a distinguished military experience during the War of the Revolution. He was strongly inclined to sustain the action of any subordinate under authority from his superior. In the *Flying Fish* case Captain Little was acting under the direct orders of the President of the United States. Nevertheless, Chief Justice Marshall finally concluded that he was personally responsible, because the order was itself illegal. He said, id. p. 178:

> "I confess, the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those of the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which, indeed, is indispensably necessary to every military system, appears to me strongly to imply the principle that those orders, if not to perform a prohibited act,

ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass."

Justice Story, however, in a later case, in which Chief Justice Marshall himself concurred, held that the order of the President calling militia into the public service, under the Act of 1795, is within the exclusive discretion of the President and cannot be questioned, and that an officer acting under the authority of that order was absolutely protected. In his case Justice Story held:

"A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance."

It will be noted, however, that in the *Flying Fish* case the order of the President was not justified by the Act of Congress, and was not, therefore, legal, while in the Martin *v.* Mott case the presidential order calling the militia into public service was apparently legal.

In Mitchell *v.* Harmony, 13 Howard 115, the Supreme Court repudiated the doctrine that an officer may take shelter under the plea of superior command, referring to an order given to a military officer by his commander to do an illegal act. The

court declared that the order was no justification to the person by whom it was executed, saying:

> "Upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior".

Without citing further cases I will say that the general rule established by the overwhelming weight of authority in this country is that persons engaged in the military service of a state or nation are not liable in a civil suit for damages for acts done in the course of their military duties in obedience to the lawful orders of their superior officer; but that if such orders are illegal, or apparently illegal, or are such as a man of ordinary sense and understanding would be justified in deeming illegal, they afford no justification for the wrongful act (see note on civil and criminal responsibility of soldiers and militia, Lawyers' Reports Annotated, 1915 A, pp. 1141, 1145 and cases cited). The rule as to criminal liability is the same except with the modification that the courts are more reluctant to enforce criminal than civil liability under such circumstances (see L. R. A., 1915 A, p. 1173 and cases cited there).

The French jurists also differ in their opinion on this question. Article 64 of the French Criminal Code lays down the rule that an act committed by a person who has been constrained by force is neither a crime nor a misdemeanor. Professor Nast, of the University of Nancy, has expressed the opinion that this immunity would cover the case of a soldier who is compelled to commit an act in violation of the laws of war, and that, therefore German soldiers who were compelled by their commanders to do such acts were not liable to arrest and trial by the French courts (26 *Rev. Gen. de Droit Int. Pub.* 1919, p. 123). Professor Merighnac, of Toulouse, takes a contrary view, and maintains that Article 64 of the Penal Code was not intended to include such cases (24 *Rev. Gen. de Droit Int. Pub.* 1917, p. 53).

Without attempting a more complete review of the authorities, it would seem that the Supreme Court at Leipsic was perhaps justified so far as the English, French and American authorities go, in holding that a subordinate officer was protected

against criminal prosecution in time of war by superior orders. At any rate, there is too much authority for that position in our English and American jurisprudence to justify us in denouncing the rule as illegal. We are however, constrained to conclude that this application of the rule was made by the Leipsic Court to protect a German naval officer, while the precise contrary of the rule was declared by the German Government in the case of Captain Fryatt.

On June 23, 1916, the steamer *Brussels,* belonging to the Great Eastern Railway, was captured by German war ships. The Captain of the *Brussels,* Charles Fryatt, a British subject, was taken to Zeebrugge, at Broughe, and after court-martial, was sentenced to death by shooting and executed on the afternoon of the same day for having attempted on March 20, 1915, to ram the German submarine U-33. On the day after the execution a despatch, said to be a German communique, appeared in the press, reading as follows:

> "The accused was condemned to death because, although he was not a member of the combatant forces, he made an attempt on the evening of March 20, 1915, to ram the German submarine U-33 near the Maas Lightship. The accused as well as the Chief Officer and the Chief Engineer of the steamer received at the time from the British Admiralty a gold watch as a reward for his brave conduct on that occasion, and his action was mentioned with praise in the House of Commons. On the occasion in question, disregarding the U-boat's signal to stop, and showing his national flag, he turned at a critical moment, at high speed, and the submarine escaped the steamer by a few meters only by immediate diving. He confessed that in so doing, he had acted in accordance with the instructions of the admiralty. One of the many nefarious *franc-tirreur* proceedings of the British marine march against her war vessels has thus found a belated but merited expiation.

Thus the German Court at Leipsic held Lieutenant Karl Neumann, the commander of the German submarine, guiltless because he was acting under the orders of his superiors, while the German military court at Zeebrugge, held Captain Fryatt to be guilty, and shot him to death on the day of his trial, notwithstanding the fact that Captain Fryatt was likewise acting un-

der the order of his superior, the British Admiralty. These two decisions, although absolutely inconsistent, are both announced with a certain brutal and highly offensive cocksureness and self-satisfaction. It was this moral blindness on the part of the German Government that destroyed a great empire and made that Government an outlaw among the nations.

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NOTE.—I have been greatly indebted in writing this sketch of the proceedings before the German Leipsic Court to an article in the *American Journal of International Law,* issued in July, 1921, by Mr. George A. Finch, entitled, "War Crimes and Responsibility Therefor." I have drawn very freely on this source, and wish to give due credit for it. The facts of these trials I have obtained from the files of the *New York Times.*

G. G. B.